

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA

SCOTT GANGLOFF  
634 Fountain Street  
Philadelphia, PA 19128,

Plaintiff,

v.

SEARS ROEBUCK & CO.  
7300 Bustleton Avenue  
Philadelphia, PA 19152,

and

BAUGHAN & BUSHNELL  
MANUFACTURING CO.  
P.O. Box 390  
11414 Maple Avenue  
Hebron, Illinois 60034-0390

Defendants.

CIVIL ACTION NO: 02-CV-4615

**DEFENDANTS' MOTION TO GRANT SUMMARY JUDGMENT**  
**DUE TO PLAINTIFF'S FAILURE TO FILE A RESPONSE**

AND NOW come the defendants, Sears, Roebuck and Co. and Vaughan & Bushnell Manufacturing Co. (improperly identified in the caption as "Sears Roebuck & Co." and "Baughan & Bushnell Manufacturing Co."), by and through their undersigned counsel, and file the within Motion to Grant Summary Judgment Due to Plaintiff's Failure to File a Response, averring as follows:

1. On April 7, 2004, this Court entered its Fourth Amended Scheduling Order, which required, *inter alia*, that all dispositive motions be filed by June 1, 2004. A true and correct copy of the Fourth Amended Scheduling Order is attached hereto as Exhibit "A."

2. On June 1, 2004, Defendants filed a Motion for Summary Judgment in full compliance with this Court's Fourth Amended Scheduling Order. A true and correct copy of the docket reflecting the filing of the Motion for Summary Judgment is attached hereto as Exhibit "B".

3. On June 1, 2004, a copy of Defendants' Motion for Summary Judgment was served on Plaintiff's counsel via first class mail. A true and correct copy of the cover letter transmitting the Motion for Summary Judgment is attached hereto as Exhibit "C."

4. In the Fourth Amended Scheduling Order, the Court clearly ordered, "Responses to any motions for summary judgment shall be filed within the time permitted under Local Rule of Civil Procedure 7.1(c)."

5. Local Rule 7.1(c) provides that "unless the parties agree to a different schedule or unless the Court directs otherwise, any party opposing the motion shall serve a brief in opposition within fourteen (14) days after service of the motion and supporting brief." L.R. 7.1(c).

6. Pursuant to the Court's Order and Local Rule of Civil Procedure 7.1(c), if Plaintiff intended to file a response to Defendants' Motion for Summary Judgment, he was required to do so no later than June 15, 2004.

7. Federal Rule of Civil Procedure 6(e) affords a party, in certain circumstances, an additional three days when served by mail. It is questionable, however, whether Rule 6(e) applies. As the Third Circuit noted in *Kabacinski v. Bostrom Seating, Inc.*, "Rule 6(e) does not apply to deadlines imposed by, or following, a court order." *Kabacinski*, 2004 WL 628867 (3rd Cir.(Pa.) (Slip. Op.), 27 NDLR P 311 (3rd

Cir. 2004) (citing *Albright v. Virtue*, 273 F.3d 564, 571 (3d Cir. 2001) (“Rule 6(e) does not apply to time periods that begin with the filing in court of a judgment or order.”))

8. Even if Rule 6(e) were applicable, under the Court’s Fourth Amended Scheduling Order, in conjunction with Local Rule of Civil Procedure 7.1(c) and Federal Rule of Civil Procedure 6(e), Plaintiff’s response, if any, in opposition to Defendants’ Motion for Summary Judgment was due no later than June 18, 2004.

9. The docket clearly indicates that as of June 21, 2004, Plaintiff has not filed a response to Defendants’ Motion for Summary Judgment.<sup>1</sup>

10. Plaintiff should not be permitted to file an untimely response in opposition to Defendants’ Motion for Summary Judgment. To do so would result in a violation not only of Local Rule 7.1(c) and Federal Rule of Civil Procedure 6(e), but more importantly in violation of this Court’s Fourth Amended Scheduling Order.

11. Trial in this matter is rapidly approaching. Pursuant to the Fourth Amended Scheduling Order, trial will begin on July 19, 2004. Motions in limine, pretrial memoranda, special interrogatories, and jury forms are to be submitted no later than July 9, 2004.

12. As Plaintiff has not filed a response in opposition to the issues raised in Defendants’ Motion for Summary Judgment, Defendants respectfully request that it be decided on its merits at this time to avoid the burden and expense of preparing for trial, as

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<sup>1</sup> It bears mention that Defendants filed a Motion For Summary Judgment on October 1, 2003 in accordance with the Court’s scheduling order that was in effect at that time. Plaintiff did not file a substantive reply to Defendants’ original Motion for Summary Judgment, but merely filed a Rule 56 affidavit alleging that more discovery was required. The Court dismissed Defendant’s original Motion for Summary Judgment without prejudice to allow Plaintiff to conduct their additional discovery.

the case should be dismissed as a matter of law for the reasons set forth in detail in Defendants' Motion for Summary Judgment.

13. Permitting Plaintiff to file an untimely response to Defendants' Motion for Summary Judgment on the eve of trial, in violation of this Court's Fourth Amended Scheduling Order, would result in severe prejudice to the Defendants in forcing them to incur the expense of trial preparation.

WHEREFORE, Defendants, Sears, Roebuck and Co. and Vaughan & Bushnell Manufacturing Co. respectfully request that the Court grant Defendants' Motion for Summary Judgment at this time

Respectfully submitted,

CIPRIANI & WERNER, P.C.

BY:

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Phone: (412) 281-2500

Counsel for the Defendants

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the within DEFENDANTS' MOTION TO GRANT SUMMARY JUDGMENT DUE TO PLAINTIFF'S FAILURE TO FILE A RESPONSE was served upon plaintiff's counsel via first class mail, postage prepaid, on June \_\_, 2004, as follows:

Thomas Sheridan, Esquire  
Sheridan & Murray  
3800 Centre Square West  
Philadelphia, PA 19102

CIPRIANI & WERNER, P.C.

BY:

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Counsel for the Defendants

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## ORDER OF COURT

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2004, in consideration of the foregoing Defendants' Motion To Grant Summary Judgment Due To Plaintiff's Failure To File A Response, it is hereby ORDERED, ADJUDGED and DECREED that the aforesaid Motion is GRANTED. Plaintiff's Complaint is dismissed in its entirety. The Clerk of Courts is hereby directed to enter judgment in favor of the Defendants and against Plaintiff.

BY THE COURT:

\_\_\_\_\_, J.